

**IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION**

T.W. and K.W. as Parents and Legal Guardian of Jane Doe, a minor	:	CASE NO. 1:18-cv-00668
	:	
Plaintiffs,	:	Judge Timothy S. Black
	:	
vs.	:	<b>REPLY MEMORANDUM IN SUPPORT</b>
	:	<b>OF DEFENDANTS' PARTIAL MOTION</b>
FINNEYTOWN LOCAL SCHOOL DISTRICT, et al.	:	<b>TO DISMISS PLAINTIFFS'</b>
	:	<b>CORRECTED AMENDED COMPLAINT</b>
	:	
Defendants.	:	

Defendants Finneytown Local School District Board of Education (“Board” or “Finneytown”), Laurie Banks, Jennifer Dinan, Douglas Dirr, Douglas Lantz, Allison McCrea, Cathy McNair, Eric Muchmore, Terri Noe, Marlo Thigpen, and Nicholas Tippenhauer respectfully submit their reply memorandum in support of their partial motion to dismiss the Corrected Amended Complaint.

Respectfully submitted,

**/s/ Ian R. Smith**

Ian R. Smith (0068195)

R. Gary Winters (0018680)

McCaslin, Imbus & McCaslin

600 Vine Street, Suite 800

Cincinnati, OH 45202

(513) 421-4646 Phone

(513) 421-7929 fax

[irsmith@mimlaw.com](mailto:irsmith@mimlaw.com)

[rgwinters@mimlaw.com](mailto:rgwinters@mimlaw.com)

*Attorneys for Defendants Finneytown Local  
School District Board of Education, Laurie  
Banks, Jennifer Dinan, Douglas Dirr,  
Douglas Lantz, Allison McCrea, Cathy  
McNair, Eric Muchmore, Terri Noe, Marlo  
Thigpen, and Nicholas Tippenhauer*

## **MEMORANDUM**

### **I. LAW AND ARGUMENT**

#### **A. Count VII: Negligence Claim Under R.C. 3313.66**

In response to Defendants' motion to dismiss Count VII, Plaintiffs now claim, after two amendments to their complaint, that they have brought a common-law tort claim. (Doc # 21, PAGEID # 191). This is a new argument unsupported by any allegations in the Corrected Amended Complaint. (Doc # 17, PAGEID # 158-159). Plaintiffs have not asserted a common-law tort claim. (*Id.*). Even Plaintiffs refer to this Count as "Negligence Claim Under R.C. 3313.66" in their Response in Opposition. (Doc # 21, PAGEID # 191). Plaintiffs' concession that this statute does not create a cause of action is fatal to this Count. It must be dismissed.

#### **B. Count VIII: R.C. 2744.03 Negligence Action Against Defendants Anderson, Dinan, and Noe**

Plaintiffs have produced no legal authority for them to pursue Count VIII. For the reasons set forth in the partial motion to dismiss, this claim must be dismissed. (Doc # 19, PAGEID # 179-180).

#### **C. Count X: Claim for Injunctive Relief**

Plaintiffs have now taken the position that they only agreed to dismiss the claim for injunctive relief in paragraph 113 of the complaint. (Doc # 21, PAGEID # 188). There is no factual basis for this contention. It runs contrary to communications between counsel (Doc # 24, PAGEID # 255), the No-Contact Agreement (Doc # 21-1, PAGEID # 198), and the filed stipulation of dismissal (Doc # 9, PAGEID # 86). Plaintiffs have agreed in writing to completely dismiss all of Plaintiffs' equitable claims and motion for permanent and preliminary injunction. (Doc # 24, PAGEID # 255).

The No-Contact Agreement, signed by Plaintiffs' counsel on November 12, 2018, states that Plaintiffs agree to withdraw their Motion for a Permanent Injunction and Preliminary Injunction. (Doc #21-1, PAGEID # 198-199).

The Stipulation, which was approved and filed by Plaintiffs' counsel on March 7, 2019, states that "Plaintiffs' equitable relief claims, as set forth in Paragraphs 112-121 (Count IX) of Plaintiffs' Complaint, are Dismissed, and that Plaintiffs withdraw their Motion for Preliminary and Permanent Injunction." (Doc # 9, PAGEID # 86). Defense counsel prepared the stipulation and submitted it to Plaintiffs' counsel on March 5, 2019. (Doc # 24-1, PAGEID # 257). Plaintiffs' counsel made no changes and filed it two days later. (*Id.*).

Count IX was later renumbered as Count X by Plaintiffs when they amended their Complaint. (Doc #1, PAGEID # 20-22, Doc #17, PAGEID # 161-163). The only substantive change between old Count IX and new Count X was the removal of the paragraph 113 which sought to enjoin Finneytown from placing Plaintiff in the same classes as the alleged harassers. (Doc #1, PAGEID # 20; Doc # 17, PAGEID # 161-163).

There is no legitimate basis by which to revive Count X or the motion for injunctive relief. The parties knowingly negotiated the dismissal of these claims.

#### **D. Count I: "Failure to Comply with Title IX" Claim Against the Board**

Plaintiffs have conceded that the implied private right of action under Title IX does not allow recovery in damages for violation of those sorts of administrative requirements. (Doc #21, PAGEID # 193). Plaintiffs claim that they seek injunctive relief under Count I. (*Id.*). For the reasons set forth above, any claim for injunctive relief should be dismissed.

### **E. Count IX: Intentional Infliction of Emotional Distress Claim**

Count IX against defendants is apparently based on a failure-to-act, not intentional or criminal conduct. (Doc #21, PAGEID # 194). Plaintiffs have alleged no conduct by any Defendant which goes beyond the intentionally tortious or criminal. *See Yeager v. Local Union 20*, 6 Ohio St. 3d 369, 671, 453 N.E.2d 666 (1983). For the reasons set forth in the partial motion to dismiss, Plaintiffs have failed to sufficiently state a claim for relief under Count IX against Defendants. (Doc # 19, PAGEID # 181-183).

## **II. CONCLUSION**

Based on the foregoing and for the reasons set forth in the partial motion to dismiss, Defendants move this Court to issue an order dismissing Counts I, VII, VIII, IX, X, and Plaintiffs' motions for injunctive relief.

Respectfully submitted,

**/s/ Ian R. Smith**

Ian R. Smith (0068195)

R. Gary Winters (0018680)

McCaslin, Imbus & McCaslin

600 Vine Street, Suite 800

Cincinnati, OH 45202

(513) 421-4646 Phone

(513) 421-7929 fax

[irsmith@mimlaw.com](mailto:irsmith@mimlaw.com)

[rgwinters@mimlaw.com](mailto:rgwinters@mimlaw.com)

***Attorneys for Defendants Finneytown  
Local School District Board of Education,  
Laurie Banks, Jennifer Dinan, Douglas  
Dirr, Douglas Lantz, Allison McCrea,  
Cathy McNair, Eric Muchmore, Terri Noe,  
Marlo Thigpen, and Nicholas Tippenhauer***

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing was filed electronically on **March 9, 2020** using the Court's CM/ECF system, which will serve all parties and counsel of record who have appeared and constitutes service by rule. A copy of this filing was also sent via e-mail to the following counsel: **Bennett P. Allen, Esq. ballen@econjustice.com and Scott A Sollmann, Esq. ssollmann@smbplaw.com.**

**/s/ Ian R. Smith**

Ian R. Smith